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CHARLES ELMORE CROPL

IN THE

Supreme Court of the United States

October Term, 1949

No. 393	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 394	A. C. CARROLL, *et al.*,	*Petitioners*
No. 395	S. T. ALRED, *et al.*,	*Petitioners*
No. 396	LOWELL E. WOMACK,	*Petitioner*
No. 397	S. T. ALRED, *et al.*,	*Petitioners*
No. 398	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 399	LOWELL E. WOMACK,	*Petitioner*

v.

CELANESE CORPORATION OF AMERICA,
Respondent

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

ISADORE KATZ,
DAVID JAFFE,
WARREN E. HALL, JR.,
Counsel for Petitioners.

104 GROSBY PRESS, INC., 30 Ferry St., N. Y. C.—BEckman—8-2336-7-8

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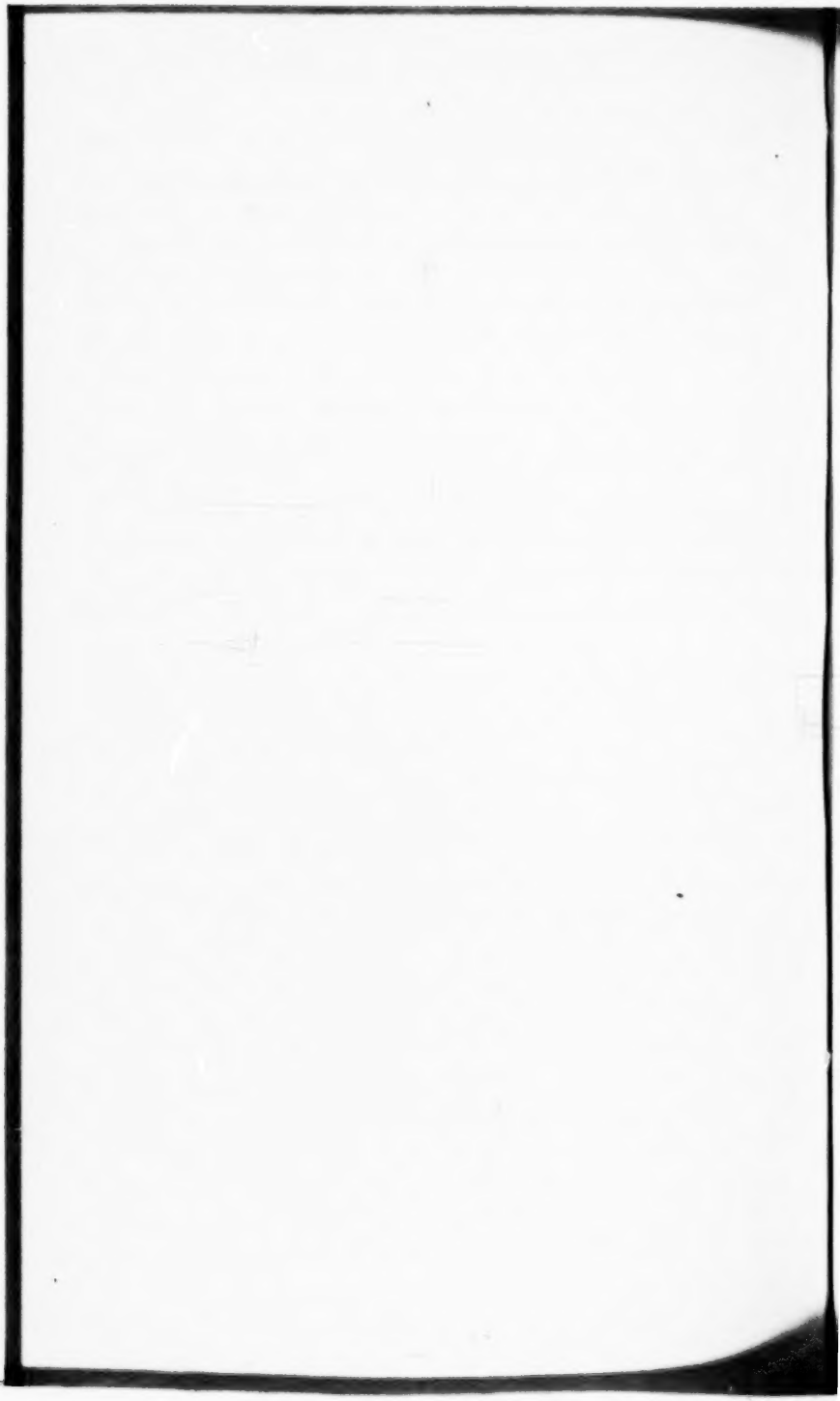
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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

J. D. Pedigo and C. L. Ross in No. 393 (No. 16581 below), A. C. Carroll and H. D. Dodd in No. 394 (No. 16582 below), S. T. Alred, Chesley Gaines and W. S. Robertson in No. 395 (No. 16583 below) and Lowell E. Womack in No. 396 (No. 16584 below) pray that writs of certiorari issue to review the decisions (and the denial of the motions

for rehearings) of the Supreme Court of Georgia affirming as criminal contempts judgments of the Superior Court of Floyd County ordering the petitioners jailed and fined for civil contempt of a temporary restraining order, issued without notice, regulating picketing in a labor dispute.

S. T. Alred, Chesley Gaines and W. S. Robertson in No. 397 (No. 16596 below), J. D. Pedigo, C. L. Ross, A. C. Carroll and H. D. Dodd in No. 398 (No. 16597 below) and Lowell E. Womack in No. 399 (No. 16598 below), pray that writs of certiorari issue to review a decision (and the denial of a motion for rehearing) of the Supreme Court of Georgia affirming judgments of the Superior Court of Floyd County denying petitioners' petitions for permanent stays of execution of judgments in civil contempt, which petitions were based on the grounds that the prior judgments in civil contempt must be permanently stayed since the strike had been settled and the main cause had been dismissed and had become moot.

Opinions Below

The opinions of the Supreme Court of Georgia appear as follows:

No.	No. Below	Citation	Record
393	16581	205 Ga. 392	51
394	16582	205 Ga. 493	120
395	16583	205 Ga. 499	178
396	16584	205 Ga. 514	233
397	16596	205 Ga. 371	308
398	16597	205 Ga. 371	308
399	16598	205 Ga. 371	308

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3). The decisions were rendered on the following dates: In No. 393 (No. 16581 below), No. 397 (No. 16596 below), No. 398 (No. 16597 below) and No. 399 (No. 16598 below) on May 13, 1949 and the motions for rehearings were denied on June 15, 1949; in No. 394 (No. 16582 below), No. 395 (No. 16583 below) and No. 396 (No. 16584 below) on June 15, 1949 and the motions for rehearings were denied on June 28, 1949. Various temporary stays of executions and withholdings of remittiturs were granted by the courts below. The petitioners are at liberty pending final determination of the actions. By order of the Chief Justice of this Court, dated September 1, 1949, petitioners' time for filing of this petition was extended to and including October 14, 1949.

1. The petitioners contend that the contempts were civil contempts, as certified by the Superior Court of Floyd County which found the petitioners to have violated the temporary restraining order of that court, and that when the strike was settled and the main cause became moot and was dismissed, any execution of the prior judgments, there then being in existence no restraining order, case, controversy or litigation of any kind or character before the court, would be without any process of law, in violation of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions, and amendments thereto, in the trial court, to permanently stay the execution of the contempt judgments (R. pp. 246, 256, 270, 278, 291, 297). The amendments are printed in the record following the

orders of the court denying the petitions, but it is clear from the certified Bills of Exceptions that the amendments were filed and considered by the trial court prior to the issuance of the orders (R. pp. 262, 284, 304). The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. section 1257 (3).

2. Only by decision of the Supreme Court of Georgia did the petitioners learn that the contempt proceedings were criminal rather than civil. The Supreme Court of Georgia, in order to arrive at its decision, specifically reversed a prior decision of that Court, holding that such contempts were civil rather than criminal, said prior decision being the law of Georgia at the time that the Superior Court of Floyd County found that the petitioners had committed civil contempt. The change in the nature of the proceedings from civil to criminal, by the decision of the appellate court, did not fairly inform the petitioners of the charges against them, did not allow them an opportunity to defend the charge first made in the appellate court, resulted in a conviction upon a charge never made in the trial court and was a retroactive operation of the decision of the Supreme Court of Georgia in the instant case, in violation of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions for rehearing. The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. Section 1257 (3).

3. Petitioners contend that if the contempts are criminal, a certification by the trial court that the evidence preponderated against them and the absence of a finding that they were guilty beyond a reasonable doubt was in violation

of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions for rehearing. The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. 1257 (3).

4. The petitioners contend that if the contempts are criminal they were denied the right of confrontation of witnesses against them in violation of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions for rehearing. The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. 1257 (3).

The jurisdiction of the Court more fully appears from the Statement and the Reasons for Granting the Writs.

Questions Presented

1. Whether a judgment in civil contempt, rendered while the main cause was pending, for violation of an order regulating picketing and other strike activities, may be executed after the strike has been settled, the plaintiff no longer needs or requests relief, the main cause has become moot and has been dismissed, there then being no order, cause, litigation, case, controversy or judicial proceeding of any kind or nature before the court, without depriving the petitioners of due process of law.

2. Whether it is a deprivation of due process of law for an appellate court to affirm, as criminal contempts, judgments in cases which were tried as civil contempts and in which the trial court certified that the petitioners were

"adjudged . . . guilty of civil contempt", if the petitioners had no knowledge of the criminal nature of the proceedings, were not tried in criminal contempt and necessarily could not defend themselves against any charge of criminal contempt and if the essential and distinguishing ingredient of criminal contempt, wilful defiance of the authority of the court, was never in issue.

3. Whether a judgment in civil contempt can be affirmed by an appellate court as a judgment in criminal contempt in the face of a certification by the trial judge that the petitioners "were heard . . . according to the rules of evidence and procedure in civil cases and at said hearing the Honorable Trial Judge found the evidence to preponderate against the petitioners" and in the absence of a finding that they were guilty of criminal contempt beyond a reasonable doubt, without depriving the petitioners of due process of law.

4. Whether a judgment in civil contempt can be affirmed by an appellate court as a judgment in criminal contempt in the absence of a confrontation of witnesses against the petitioners in the trial court without depriving them of due process of law.

Statement

Textile Workers Union of America, C. I. O., a labor organization representing respondents' employees, engaged in a strike at the respondent's plant in Rome, Georgia. All of the petitioners are members of that Union. Respondent did not attempt to operate its plant until October 26, 1948. On October 25, 1948 respondent filed a petition in equity in the Superior Court of Floyd County, Georgia, against

certain of its employees and certain members of the Union, and on the same day there was issued, without notice to the defendants, a temporary restraining order prohibiting and regulating certain anticipated picketing and other strike activities of the defendants. (Although a preliminary injunction was issued on December 2, 1948, all the citations for contempt ante-dated and are based upon violations of the temporary restraining order.)

Petitioners seek review of the judgments for contempt of the temporary restraining order in No. 393 (No. 16581 below), No. 394 (No. 16582 below), No. 395 (No. 16583 below) and No. 396 (No. 16584 below). Only three citations for contempt are involved in those four cases. These citations appeared as separate motions on the docket of the Floyd County Superior Court but all "sounding in the same cause as the aforesaid petition for injunction" (R. pp. 8, 78, 156, 202) clearly revealing the ancillary character of the citations. Petitioners Pedigo and Ross, cited in the first citation, were tried separately in No. 393 (No. 16581 below). Petitioners Carroll and Dodd, also cited in the first citation, were tried separately in No. 394 (No. 16582 below), thus accounting for four cases involving three citations.

The trial judge certified in the Bills of Exceptions that the petitioners were "adjudged . . . guilty of civil contempt" (R. pp. 47, 158, 205),[1] and that the cases "were

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[1] That language appeared only in No. 393 (No. 16581 below), No. 395 (No. 16583 below) and No. 396 (No. 16584 below, although it is clear from the Bill of Exceptions in No. 398 (No. 16597 below), involving the motion to stay the judgments in Nos. 393 and 394 (Nos. 16581 and 16582 below), that the proceedings were identical (R. pp. 280, 281).

heard . . . according to the rules of evidence and procedure in civil cases and at said hearing the Honorable trial judge found the evidence to preponderate against" the petitioners (R. pp. 258, 259, 281, 301). From the judgments finding petitioners guilty of civil contempt, appeals were taken.

On December 8, 1948 the Union and the respondent settled the strike. As part of the strike settlement, the respondent agreed to the dismissal of the petition for injunction and of all citations for contempt that had not been adjudicated and further agreed not to oppose, in the trial court, motions for permanent stays of execution of the contempt judgments. On December 17, 1948, the trial judge entered an order of dismissal as follows:

> "The within case is hereby dismissed together with all citations for contempt of Court not yet tried, except that the same is not dismissed and the Court hereby expressly retains jurisdiction of said cause insofar as it pertains to citations for contempt of Court docketed as numbers 3234,[2] 3249 and 3258 and to those respondents in said citations who have been adjudged guilty of contempt of Court . . . and said cause as to said cases for respondents is not dismissed" (R. p. 246).

Thereafter the petitioners petitioned the trial court for permanent stays of execution of the contempt judgments on the ground that, being ancillary proceedings in civil contempt, they must fall with the mootness and dismissal of the main cause. These petitions for permanent stays were denied and appeals taken. The motion for permanent stay in No. 398 (No. 16597 below) was with respect to the

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[2] Incorrectly copied in the decision of the Supreme Court of Georgia as 3232 (R. p. 317).

contempt judgments in Nos. 393 and 394 (Nos. 16581 and 16582 below); in No. 397 (No. 16596 below) with respect to No. 395 (No. 16583 below); in No. 399 (No. 16598 below) with respect to No. 396 (No. 16584 below).

By the consolidated decision of the Supreme Court of Georgia in Nos. 397, 398 and 399, (Nos. 16596, 16597 and 16598 below) it was first learned by the petitioners that the contempt proceedings were criminal rather than civil. The petitioners had believed that they were tried for civil contempt. That was surely the understanding of the trial judge and it must have been the understanding of the respondent inasmuch as the respondent at no time objected to the trial judge's certifications to that effect in the Bills of Exceptions, nor did it answer or demur to the petitions for permanent stays and amendments thereto, reciting the civil nature of the contempts, although such opportunity was afforded by the trial judge.

The contempts became criminal by decision of the Supreme Court of Georgia but only by virtue of that Court's specific reversal in its decision in the instant cases (R. p. 319) of its decision in *Wagner* v. *Commercial Printers,* 203 Ga. 1, a case which held that a contempt proceeding such as in the instant cases was civil rather than criminal. (The *Wagner* case had been appealed to the Supreme Court of Georgia on the ground that the contemnors had not been proved guilty beyond a reasonable doubt. The court held that the reasonable doubt rule did not apply because the contempt was civil.) Thus the law of Georgia was changed after the trials in the instant cases and was made applicable retroactively to the instant cases despite the fact that the petitioners had not been tried for criminal contempt.

A large proportion of the evidence at the contempt hearings was presented by the respondent in affidavit form. Proceeding on the assumption, which was also the assumption of the trial court and the respondent, that the contempts were civil, the contemnors did not, of course, challenge the right of the respondent to present most of the evidence by affidavits. Some of the witnesses against the petitioners were cross-examined orally. In the motions for rehearing, however, having learned that the civil contempt had been converted into a criminal contempt by the decision of the Supreme Court of Georgia, the petitioners made timely objection to the evidence in affidavit form on the ground that they were denied the right of confrontation of the witnesses against them.

Reasons for Granting the Writs

What was at one time the extraordinary writ of injunction has now become in the state courts a commonplace process for the attempted resolution of labor disputes. The inevitable contempt proceedings following the issuance of the writ, indeed the writ itself, can rarely be scrutinized by this Court because the dispute often becomes moot and the contempt punishments are executed before review may be had. And it is not often that petitioners, associated with the trade union movement, can afford what is to them the enormous expense that litigation of this type entails. The instant record provides the Court with an unusual opportunity to examine, from the perspective of the Fourteenth Amendment, the practices and procedures in contempt proceedings that have now blanketed a wide area of industrial disputes. The state courts have not followed the decisions

of this Court, perhaps because the federal statutory protections in contempt proceedings have obscured for those courts the decisions of this Court on the constitutional questions involved in contempt cases. Whatever the reason, it nevertheless remains that in the state courts the obfuscatory Latin rationalization that contempt proceedings are "sui generis" has served to perpetuate the obscenities of Star Chamber and the excresences of Wilmot's undelivered opinion in *Almon's case* (Fox, *Contempt of Court*) to the exclusion of what this Court has considered to be "implicit in the concept of ordered liberty", *Palko* v. *Connecticut,* 302 U. S. 319, 325.

1. At this point in stating our reasons, we proceed upon the assumption that the contempts were and must remain civil and that the arbitrary failure of the Supreme Court of Georgia to observe the distinction between civil and criminal contempt cannot foreclose this Court from the determination of whether the contempts were civil or criminal, since substantial constitutional rights of the petitioners depend upon the preservation of that distinction, *Scott* v. *McNeal,* 154 U. S. 34, 45, 46; *Chicago B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 234; *Coombes* v. *Getz,* 285 U. S. 434, 441.

While the judgments of contempt may have been rendered when the Trial Court may have had jurisdiction of the main cause, the petitioners are now threatened with jail and fines for civil contempt of an order that is no longer in existence, which was issued in an injunction action that is no longer pending, which in turn grew out of a strike that has been settled. Under such circumstances the refusal to stay execution is patently arbitrary and wholly

without process of any law, since the only purpose of a civil contempt proceeding is to coerce the contemnor for the benefit of the plaintiff in the main cause. That civil contempt judgments must fall when the plaintiff either no longer needs or is not entitled to relief by way of coercive punishment of the contemnor, has always been the law,[3] and we have been unable to find any case to the contrary.

The main cause became moot and was dismissed.[4] The order issued in the main cause could not, after mootness and dismissal of the main cause, be attacked. By operation of law the petitioners were deprived of the right of any appellate review in any court of the order which it is claimed they have violated and for which civil liability was imposed by way of the contempt judgments; petitioners could not attack the order collaterally or otherwise. This, if nothing else, lays bare the want of jurisdiction in the trial court to execute the judgments for civil contempt, although it would be otherwise if the contempt were criminal. In this

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[3] *Howard* v. *Durand*, 36 Ga. 346, 360; *United States* v. *United Mine Workers of America*, 330 U. S. 258, 294, 295; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 451, 452; *Leman* v. *Krentler-Arnold Hinge Co.*, 284 U. S. 448, 453; *Worden* v. *Searles*, 121 U. S. 14, 25; *Salvage Process Corp.* v. *Acme Tank Cleaning Corp.*, 86 F. 2d 727; *S. Anargyros Inc.* v. *Anargyros & Co.*, 191 Fed. 208; *In re Fanning*, 40 Minn. 4; *Western Fruit Growers' Assn.* v. *Bernardy*, 128 Minn. 153; *Kaehler* v. *Dobberpuhl*, 56 Wis. 497; *Brunson* v. *Brunson*, 91 S. C. 411; *People ex rel. Hess* v. *Finn*, 176 Misc. 402.

[4] The statement in the opinion of the Supreme Court of Georgia in No. 393 (No. 16581 below) that the order "is still outstanding; never having been reviewed or set aside . . ." (R. p. 57) is refuted by that Court's quotation in its opinion in Nos. 397, 398, and 399 (Nos. 16596, 16597 and 16598) of the trial judge's order that "The within case is hereby dismissed . . ." except with respect to those found guilty of contempt (R. p. 317).

perspective the want of due process results from the want of jurisdiction, there being no *lite pendente, Pennoyer* v. *Neff*, 95 U. S. 714, *Scott* v. *McNeal, supra.* Such want of jurisdiction is not dependent upon non-residence, *Griffin* v. *Griffin,* 327 U. S. 220, 228, nor upon the later application of the full faith and credit clause, *Riverside & Dan River Cotton Mills* v. *Menefee,* 237 U. S. 189, 196, 197, and may appear at later stages in the litigation, *Wetmore* v. *Karrick,* 205 U. S. 141. And if there is lack of jurisdiction a contempt proceeding, no matter at what stage, is *coram non judice* and lacks due process, *Ex parte Rowland,* 104 U. S. 64, *Ex parte Fiske,* 113 U. S. 713, *Ex parte Sawyer,* 124 U. S. 200.

The want of jurisdiction of civil contempt may not be cured by the mere assertion that the contempt is criminal. The preservation of the distinction between criminal and civil libel, for example, is not merely a matter of sound technical practice. *A fortiori* between criminal and civil contempt, since, as will appear in the reasons *infra,* they are as dissimilar as any two types of actions can be. Criminal contempt is brought to punish for defiance of judicial authority, civil to coerce the contemnor for the benefit of the plaintiff. The proof of criminal contempt, by the very nature of the action, must include proof of the wilful defiance which is not an element of civil contempt. While we know of no case directly holding that the state courts must constitutionally preserve the distinction between criminality and civil liability, we are persuaded that to ignore the distinction deprives both contemnors and plaintiffs, as the case may be, of substantial constitutional rights.

Highlighting the necessity for the preservation in the state court of the distinction between the two types of con-

tempt is the problem that would arise on removal to a federal court (as was done in the main cause because the complaint specifically stated a federal question, although the removal proceeding is not here of record and the remand is not complained of). The state court order would remain in effect after removal, 28 U. S. C. Sec. 1450, if there were no remand. The federal court would have jurisdiction of civil contempts committed before and after removal but only of criminal contempts committed after removal. The state court would have no jurisdiction of civil contempts committed before or after removal but would have jurisdiction of criminal contempts committed before removal. It would be a denial of due process, therefore, if a state court were to proceed upon a contempt committed before removal, asserting jurisdiction on the erroneous theory that it might classify as a criminal contempt what was actually a civil contempt. Under such circumstances it could not be claimed that the classification of contempts is wholly a matter of state practice into which this Court may not inquire. Nor is the constitutional preservation of the distinction between the two types of contempt proceedings wholly for the benefit of alleged contemnors. A plaintiff may not be deprived of due process of law by the exercise of executive clemency with respect to a civil contemnor, *Ex parte Grossman,* 267 U. S. 87, 111, 121. The court noted that

> "long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemner for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part

> of the court's order necessary to secure the rights of the injured suitor.
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> • • •
>
> "A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's rights."

Nor may the civil character of the contempt, essential to the petitioner's argument on the point of arbitrariness and lack of jurisdiction, be lost to them because the Supreme Court of Georgia decided that the case must have been criminal since a criminal punishment was imposed. It is wholly without significance that the character of the punishments may have been vindictive in the criminal sense rather than coercive in the civil sense. If the type of punishment were to determine the type of proceeding that was brought, *ex post facto,* then to Anglo-American jurisprudence there would be imported a new doctrine, unknown to Gilbert and Sullivan, to let the crime fit the punishment. The Chief Justice in his opinion in *United States* v. *United Mine Workers of America,* 330 U. S. 258, 297, specifically rejected this boot-strap reasoning. Accord: *Penfield Co.* v. *Securities & Exch. Com.,* 330 U. S. 585, 595, *Michaelson* v. *United States,* 266 U. S. 42, 65.

In sum, therefore, it is arbitrary and wanting in jurisdiction, thus lack of due process, to execute contempt judgments in a civil contempt when there is no relief to which the plaintiff is entitled nor any cause pending in which the plaintiff seeks relief.

2. At this point and the sequential points, in stating our reasons, we assume, *arguendo* only, that the contempts

are criminal. Since the trial judge and the parties acted upon the the assumption that the proceedings were for civil contempt, the decision of the Supreme Court of Georgia that they were criminal deprived the petitioners of due process because they had no notice of the criminal nature of the proceedings, were not tried for criminal contempt, necessarily could not defend themselves against that charge and necessarily could not have been found by the trial judge to have committed criminal contempt because the essential and distinguishing ingredient of criminal contempt was never in issue before the trial court.

Here, again, the distinction between civil and criminal becomes of constitutional significance because of the lack of notice and the allied rights. Although some of the verbal or physical acts may constitute elements of both criminal and civil contempt, it nevertheless remains that there must always be differences of substance between the crime and the ancillary civil proceeding. So clear was it to Holmes, J., that criminal contempt in violation of a labor injunction was a crime that "If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers* v. *United States,* 233 U. S. 604, 610. Contempt in the civil sense is a term of art but in the criminal sense it has its popular meaning—"the act of scorn or despising", *Winston Dictionary* (Coll. ed., 1943). The Chief Justice states it well in his opinion in *United States* v. *United Mine Workers of America,* 330 U. S. 258, 303:

> "One who defies the public authority and willfully refuses obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful

> and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future."

Since the proof of criminality, in a sense *mens rea,* is a condition precedent to conviction for criminal contempt and is its essential and distinguishing ingredient by the very nature, purpose and definition of the action, there could have been no notice to, or opportunity to defend by, the contemnors nor consideration of the elements of criminal contempt by the trial judge in his finding if the trial judge and the parties proceeded upon the assumption that they were engaged in the trials of ancillary proceedings in civil contempt and if the trial judge certified that the proceedings were such. The right to notice and the right to defend on the charge on which guilt is found and the right only to be found guilty by the trial court on the charge considered by it, are separately guaranteed both in the state and federal courts on charges both of criminal contempt and crimes. *Re Oliver,* 333 U. S. 257, 273; *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 446; *Cooke* v. *United States,* 267 U. S. 517, 537; *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *DeJonge* v. *Oregon,* 299 U. S. 353, 362; *Cole* v. *Arkansas,* 333 U. S. 196, 201; *United States* v. *Cruikshank,* 92 U. S. 542, 569; *Holden* v. *Hardy,* 169 U. S. 366, 389, 399.

We advert again to the point made *supra* that the mere fact that criminal punishment was imposed by the trial judge can not be given retroactive effect so as to render the proceedings criminal *ab initio.* Making the crime fit the punishment does not substitute for notice or the opportu-

nity to be heard or the consideration by the trial judge, in his finding of guilty, of the esesntial ingredient of the crime.

In the opinion of the Supreme Court of Georgia was contained the first notice the petitioners had that they were charged with criminal contempt. In order to give such notice to the petitioners, albeit retroactively, that Court candidly reversed its decision in *Wagner* v. *Commercial Printers, supra.* While the principle of *stare decisis* does not give litigants vested rights in judicial opinions, such retroactive operation of the decision of the Supreme Court of Georgia in reversing a prior decision may not excuse a denial of a constitutional right, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673.

3. We next come to what the Chief Justice in his opinion in the *Mine Workers* case referred to as the "enhanced protections accorded defendants in criminal contempt proceedings."[6] Surely one of those enhanced protections constitutionally required is that the presumption of innocence must be rebutted by proof beyond a reasonable doubt. Such proof is constitutionally required in criminal contempt cases in the federal courts, *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 444; *Michaelson* v. *United States,* 266 U. S. 42, 66, cited with approval on this point in the *Mine Workers* case; *Oriel* v. *Russell,* 278 U. S. 358, 364; *Western Fruit Growers, Inc.* v. *Gottfried,* 136 F. 2d 98, 101; in criminal cases in the federal courts, *Warszower* v. *United States,* 312 U. S. 342, 347, 348; in criminal cases in the state courts, *Cockrill* v. *California,* 268 U. S. 258, 261; *Bailey* v. *Alabama,* 219 U. S. 219, 234.

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[6] 330 U. S. 258, 298, footnote omitted.

Until the decision in the instant cases that was also the law of Georgia in criminal contempt cases, *Wagner* v. *Commercial Printers*, 203 Ga. 1, 7, *Drakeford* v. *Adams*, 98 Ga. 722, 725. The *Drakeford* case was specifically reversed by the Supreme Court of Georgia in its opinion (R. p. 58) in No. 393 (No. 16581 below). (It is of interest that *Drakeford* v. *Adams* was cited with approval in *Gompers* v. *Buck's Stove & Range Co.*) The Supreme Court of Georgia held that the doctrine of the *Drakeford* case was no longer applicable and that reasonable doubt was not not required in criminal contempt cases in Georgia because it was not part of the law of England at the time of the Georgia reception statute. That statute can not, of course, determine the rights of the petitioners under the Fourteenth Amendment. It was specifically held by this court that the guarantees of the Fourteenth Amendment were not dependent upon the reception of English law, *Powell* v. *Alabama*, 287 U. S. 45, 60. If Holmes was right to the extent that criminal contempts are crimes then the reasonable doubt rule, constitutionally required in criminal contempts and in crimes in the federal courts as well as in crimes in the states courts must also be required in criminal contempts in the state courts. To adopt the reasoning of the Supreme Court of Georgia would be to adopt the theories of Star Chamber and of Wilmot, J.; see Fox, *Contempt of Court* and Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts*, 37 Harv. L. R. 1010. On the question of the timely raising of this point, see our discussion *infra*.

4. We direct attention to another "enhanced protection" guaranteed in criminal cases. The defendant's

right to be confronted by the witnesses against him has a dual purpose. Not only was it intended to prevent the conviction of defendants upon depositions or *ex parte* affidavits but also to test the recollection of witnesses in the exercise of the right of cross examination, *Dowdell* v. *United States,* 221 U. S. 325, 330. "The right of confrontation did not originate with the provision of the 6th Amendment, but was a common law right . . .", *Salinger* v. *United States,* 272 U. S. 542, 548. This Court has held that contemnors in a criminal contempt proceeding in a state court have the right of confrontation, *Re Oliver,* 333 U. S. 257, 273, evidently overruling *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31 on this question.

To our knowledge, this is still the law of Georgia, *Warner* v. *Martin,* 124 Ga. 387, 390, *Carson* v. *Ennis,* 146 Ga. 726. In the *Carson* case, the holding that criminal contempt proceedings may be based upon affidavit (p. 728) means merely that such proceedings may be initiated by affidavit instead of by an information. The court indicated that the proper procedure thereafter was that the court should "proceed to hear testimony in the usual way" (p. 729). We do not know why the Supreme Court of Georgia did not pass upon this point. It was raised in the petitions for rehearing; that was the first time that the petitioners learned of the criminal nature of the contempts. That was the proper time to raise that question, as well as any other questions relating to the criminal nature of the proceedings, *Cole* v. *Arkansas,* 333 U. S. 196. It may be that the Supreme Court of Georgia believed this point to lack substance because some testimony of the plaintiff's witnesses was oral and because the contemnors did not object to the use of affidavits. But this only highlights the fatal lack of

due process resulting from the lack of notice that the contempts were criminal. The contemnors could not have objected at the time of the trial of the contempt cases, inasmuch as the trial court and the parties believed that they were engaged in the trial of a civil contempt in which affidavits were admissible.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for the writs of certiorari should be granted.

Respectfully submitted,

ISADORE KATZ,
DAVID JAFFE,
99 University Place,
New York 3, N. Y.

WARREN E. HALL, JR.,
Candler Building,
Atlanta 3, Georgia.

Counsel for Petitioners.